MOTION FILED
APR 2 - 2004

(2)

No. 03-1238

IN THE

SUPREME COURT OF THE UNITED STATES

IBP, INC.,

Petitioner,

v.

GABRIEL ALVAREZ, individually and as a class representative; RANULFO GUTIERREZ, individually and as a class representative; PEDRO HERNANDEZ, individually and as a class representative; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF NATIONAL CHICKEN COUNCIL, AMERICAN MEAT INSTITUTE, AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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April 2, 2004

Washington, D.C. • THIEL PRESS • (202) 328-3286

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

Pursuant to Rule 37.2(b) of the rules of the Supreme Court, the National Chicken Council ("NCC"), the American Meat Institute ("AMI"), and the National Association of Manufacturers ("the NAM") respectfully request leave to file the attached brief of amici curiae in support of Petitioner's request for a writ of certiorari. A letter of consent from Petitioner for filing of this brief has been filed with the Clerk of Court. Respondents have refused to consent to the filing of this brief.

In this case, the Ninth Circuit has determined that meat processing employees are entitled to compensation for time spent walking to their work stations. This decision is in direct conflict with that of other courts of appeals which have considered the compensability of such activities.

NCC is the primary trade organization representing the poultry industry in the United States. The member companies of NCC produce and process more than 90 percent of the broilers and fryer chickens marketed in the United States and employ in excess of 300,000 workers throughout the United States.

AMI is the nation's oldest and largest trade association representing packers and processors of beef, pork, lamb, veal, turkey, and processed meat products. AMI member companies produce more than 95 percent of meat products available in the United States. There are more than 200,000 workers employed in the meat packing and processing industries in the United States. AMI has represented the interests of the meat packing and processing community since the Federal Meat Inspection Act was passed in 1906.

The NAM is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector in all 50 states.

The issue raised by this case regarding the compensability of walking time is extremely important to members of NCC, AMI, and the NAM and directly affects their operations. Many members of NCC, AMI, and the NAM are currently subject to inconsistent interpretations of the Fair Labor Standards Act, 29 U.S.C. §201-219 (Supp. 2000) ("FLSA"). The current split of authority among the circuits thus places significant burdens on the operations of amici's members. In fact, many members of NCC, AMI, and the NAM will be subject to conflicting interpretations of the FLSA within the scope of their own operations.

The amici wish to bring to the Court's attention the impact on their members and on other public and private employers of the split of authority on the compensability of the activities at issue in this case. NCC, AMI, and the NAM believe that they will provide the Court with particular insight into the issues presented by this case.

Respectfully submitted,

David R. Wylie

QUESTION PRESENTED

This brief for amici curiae will address the following question presented in the petition for writ of certiorari:

> **"Whether walking that occurs between compensable clothes-changing time and the time employees arrive at or depart from their actual work stations constitutes noncompensable 'walking . . . to and from the actual place of the performance of the principal activity' within the meaning of Section 4(a) [of the Portal-to-Portal Act]."**

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BRIEF OF AMICI CURIAE

REASONS FOR GRANTING THE WRIT

I.
THE NINTH CIRCUIT'S CONCLUSION THAT WALKING TIME IS COMPENSABLE UNDER THE FLSA IS IN CONFLICT WITH LONG-STANDING INTERPRETATIONS OF THE FLSA INCLUDING RECENT DECISIONS OF THE FIRST AND TENTH CIRCUITS.

The Ninth Circuit concluded that the employer in this case was required to compensate employees for time spent walking to their work stations after their first compensable donning activity and time spent walking from their work stations prior to their last compensable doffing activity. Pet. App. 18a-19a.[1] This conclusion is in conflict with opinions of the First and Tenth Circuits, is contrary to the plain language of Section 4 of the Portal-to-Portal Act amendment to the FLSA,[2] and also ignores the Secretary of Labor's ("Secretary") interpretive regulations. In fact, the Portal-to-Portal Act was enacted in direct response to a Supreme Court opinion that found such time to be compensable.

In *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), the definition of "work" under the FLSA was extended to include time spent by employees walking to their workstations and time spent in ancillary activities at their workstations before and after their shift. The *Mt. Clemens* Court concluded that walking to a workstation required an employee to be on the employer's premises and that without the employee

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[1] Pursuant to Rule 37.6, amici NCC, AMI, and the NAM state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than Amici, has made a monetary contribution to the preparation of submission of this brief.

[2] 29 U.S.C. § 254 (Supp. 2000).

walking to the workstation, the "productive aims of the employer" could not have been met. *Id.* at 691. The Court concluded that walking constituted "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Id.* at 691-92 (footnote omitted) (quoting *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944), and *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161, 164-66 (1945)).

Congressional response to the *Mt. Clemens* decision was immediate and unequivocal. In its next session in 1947, Congress passed the Portal-to-Portal Act with the express purpose of foreclosing "portal-to-portal" pay claims seeking compensation for the time from the instant an employee set foot on the employer's premises to the time of departure. Subsequent decisions have recognized that the Portal-to-Portal Act was a direct congressional response designed to nullify the *Mt. Clemens* decision. *See, e.g., Steiner v. Mitchell*, 350 U.S. 247, 253 (1956) (stating that the Portal-to-Portal Act was designed to meet an emergency resulting from the employee claims arising from the *Mt. Clemens* decision, which, if allowed to continue, would have created "wholly unexpected liabilities" to employers that were "immense in amount"); *Tum v. Barber Foods, Inc.*, Nos. 02-1679; 02-1739 (1st Cir. Mar. 10, 2004) ("*Tum II*") (observing that the purpose of the Portal-to-Portal Act was "to exclude preliminary and postliminary waiting and walking time from compensability); *Reich v. IBP, Inc.*, 820 F. Supp. 1315, 1323 (D. Kan. 1993), *modified and vacated in part by* 1 Wage & Hour Cas. 2d (BNA) 863 (D. Kan. June 2, 1993), *aff'd and remanded by* 38

F.3d 1123 (10th Cir. 1994) (stating that "[t]he legislative history of the Portal Act indicates that preliminary activities such as those held to be compensable in *Mt. Clemens* are no longer compensable under FLSA"); *United States v. Cook*, 795 F.2d 987 (Fed. Cir. 1986) (observing that intent of Portal-to-Portal Act was to prevent thousands of lawsuits to recover wages for time workers were in transit to and from workstations); *Northwestern-Hanna Fuel Co. v. McComb*, 166 F.2d 932 (8th Cir. 1948) (stating that it was common knowledge that congressional intent was to cut off vast amount of unforeseen damages some Supreme Court decisions created to the detriment of employers); *Bateman v. Ford Motor Co.*, 76 F. Supp. 178 (E.D. Mich. 1948), *aff'd sub nom. Fisch v. Gen. Motors Corp.*, 169 F.2d 266 (6th Cir. 1948), *cert. denied*, 335 U.S. 902 (1949) (stating that the "main purpose" of the Portal-to-Portal Act was to prevent employees' claims for time spent "walking, washing, punching the clock, changing clothes, etc."). In concluding that walking time is compensable in the present case, the Ninth Circuit has returned to pre-1947 reasoning and created an intolerable conflict of authority.

The Portal-to-Portal Act makes expressly clear that time spent walking, as well as time spent performing other preliminary activities, is "not compensable." The Act provides:

> **(a) Activities not compensable**
> Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended . . . on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for

or on account of any of the following activities of such employee engaged in on or after May 14, 1947–

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. §254(a) (Supp. 2000).

This section of the Portal-to-Portal Act makes clear what the opinion of the Ninth Circuit ignores – that the Portal-to-Portal Act excludes not only "preliminary" and "postliminary" activities (see subsection (a)(2)), but also expressly excludes the "walking" time (see subsection (a)(1)) at issue in this litigation.

The First Circuit's recent rehearing decision in *Tum v. Barber Foods* (*Tum II*) makes clear that the Ninth Circuit's opinion in the present case creates a direct conflict with longstanding interpretations of the Portal-to-Portal Act. In a prior decision, a panel of the First Circuit found that walking time that followed compensable donning activities or preceded the last compensable doffing activity was not compensable under the Portal-to-Portal Act. *Tum v. Barber Foods, Inc.*, 331 F.3d 1, 6 (1st Cir. 2003) ("*Tum I*"). The First Circuit found that "walking time [was] not automatically excluded from the purview of the Portal-to-Portal Act by virtue of following compensable doffing." *Id.* at 6. In this

case, the Ninth Circuit acknowledged the conflict between its opinion and that of the First Circuit in *Tum I*. Pet. App. at 19a.

Following *Tum I*, the employees filed a petition for rehearing. *Tum II*, slip op. at 2. In response to specific questions posed by the First Circuit, the Secretary of Labor, as an amicus curiae, submitted a brief setting forth the Secretary's position on the compensability of walking time that follows compensable donning or precedes the last compensable doffing activity. The First Circuit granted rehearing but rejected the Secretary's position that the workday began with an employee's first, and ended with an employee's last, principal activity. *Id.* at 14. The Secretary argued that any compensable donning activity should be considered the beginning of the workday and that the employee's last compensable doffing activity should be considered the conclusion of the workday. *Id.* at 12-13. Expressly recognizing the conflict with the Ninth Circuit's opinion in this case, the First Circuit rejected this expansion of compensable activities, finding that this reasoning would "undermine" the very purpose of the Portal-to-Portal Act. *Id.* at 14.

With regard to the interpretation of the FLSA urged by the Secretary, the First Circuit observed that "[t]he [S]ecretary urges an expansion of the ordinary 'workday' rule in favor of a broader, automatic rule that any activity that satisfies the 'integral and indispensable' test itself started the workday, regardless of context." *Id.* at 12. Citing *Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556 (E.D. Tex. 2001), *aff'd*, 44 Fed. Appx. 652 (7th Cir. 2002),[3] and *Reich v. IBP, Inc.*, 38 F.3d

[3] Fifth Circuit Local Rule 47.5.4 permits citation of unpublished decisions as persuasive authority.

1123 (10th Cir. 1994), the court noted that the Secretary's position has been rejected by two circuits and also expressly noted the conflict with the Ninth Circuit's opinion in the present case. *Id.* The First Circuit concluded that "the Secretary's present litigation position in our view, pushes so far that it threatens to undermine the Portal-to-Portal Act." *Tum II*, slip op. at 14.

The Ninth Circuit's conclusion in this case that donning and doffing constitute first and last principal activities and that the FLSA requires compensation for intervening time spent walking was expressly rejected by an earlier decision of the Tenth Circuit in *Reich v. IBP. Inc.* In *Reich*, the court held that

> [d]espite having found that putting on, cleaning, and taking off the unique personal protective gear was a compensable work activity, the district court nevertheless declined to hold that these actions were the first and last principal activities of the workday which would commence and toll the running of the timeclock, including "wait and walk time." The district court found that there existed considerable flexibility and personal discretion with regard to the time and speed that these activities took place. . . . Given these circumstances, the district court concluded that the workers should be paid on the basis of reasonable time to conduct these activities, not to include "wait and walk time." . . . We affirm . . . the denial of "wait and walk time" related to the above issues.

38 F.3d at 1127.[4] Similarly, as noted in *Tum II*, the Fifth Circuit affirmed without published opinion a decision dismissing claims by poultry workers for compensation for time spent walking to and from their work stations. *Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d at 563 n.12.

[4] In *Reich v. IBP*, the donning and doffing activities of knife-wielding meat processing employees were found to be compensable, while similar activities of non-knife-wielding employees were found to be noncompensable. 38 F.3d at 1125-26. The Ninth Circuit's opinion in this case would create the following anomaly: knife-wielding employees, once they have performed the "first principal activity" of donning, would be compensated for time spent walking to the work station. Non-knife-wielding employees, however, would not be compensated for such walking time because their donning and doffing activities are not compensable. Any interpretation of the statute that yields such a result is clearly in conflict with the statute's plain meaning.

[footnote continued]

In other contexts, courts have concluded that even significant time spent walking or otherwise traveling to and from a work site is not compensable under the Portal-to-Portal Act, even where such travel occurs on the employer's property. In *Carter v. Panama Canal Co.*, 463 F.2d 1289 (D.C. Cir. 1972), locomotive operators employed on locks operated by the Panama Canal Company were required to be on board their locomotive at the beginning of their shift. Prior to their shift, the operators were required to check an assignment board and then walk 2 to 15 minutes to reach their locomotive, depending upon the location of the locomotive to which they were assigned. *Id.* at 1291. The court found that the principal activity of the operators was operation of the locomotive, and the actual place of performance of their work was the locomotive itself. *Id.* at 1294. The court found "little room for question" that the locomotive operators' claims for compensation for time spent walking to and from their locomotives were "precluded by the Portal-to-Portal Act." *Id.* at 1292. Similarly, in *Ralph v. Tidewater Constr. Corp.*, 361 F.2d 806 (4th Cir. 1966), operating engineers and ironworkers employed in

the construction of the Chesapeake Bay bridge sought compensation for a daily boat ride to their work site, which required 15 minutes to 1 hour each way. The Fourth Circuit found that claims for such compensation were specifically precluded by Section 4(a) of the Portal-to-Portal Act. *Id.* at 808-09; 29 U.S.C. §254(a).

The Ninth Circuit's conclusion that walking time is compensable when it is incidental to compensable doning and doffing is also implicitly in conflict with the opinions of at least three courts of appeals that have rejected such reasoning in addressing the compensability of travel time for police dog handlers. For example, in *Reich v. N.Y. City Transit Auth.*, 45 F.3d 646 (2d Cir. 1994), dog handlers employed by the New York Transit Authority Police Department sought compensation for time spent commuting with their dogs. Each handler had sole responsibility for the care of his or her dog and was required to groom, feed, walk, train, house, and otherwise care for the dog. *Id.* at 648. The dog handlers were not permitted to travel to work using public transportation but were required to use their personal vehicles to transport the dogs to and from work. *Id.* The Second Circuit rejected the argument of the Secretary that because the handlers were required to perform compensable activities related to caring for the dogs, the travel time to and from work was, therefore, compensable. The court concluded that

> the time spent by handlers driving to and from work with their dogs, except to the extent that actual duties of care, feeding, training, walking or cleaning up occur during such commute, is not compensable work. Such true dog-care work occurring during the commute, however, is not exempted from compensation by the Portal-to-Portal Act.

Id. at 652. Both the Federal Circuit and the Sixth Circuit have reached similar conclusions. *See Bobo v. United States*, 136 F.3d 1465, 1468 (Fed. Cir. 1998), and *Aiken v. City of Memphis*, 190 F.3d 753, 758 (6th Cir. 1999).

At least implicitly, these decisions reject the proposition that the performance of some compensable activity prior to or during travel time commences the workday and renders such travel time compensable. In contrast, under the reasoning of the Ninth Circuit, if a police dog handler's commute to work followed compensable dog care activities, the time spent commuting would be compensable. Under Section 4(a) of the Portal-to-Portal Act, there is no distinction between time spent "walking," "riding," or "traveling," to a workplace. 29 U.S.C. §254(a). This is precisely the type of "absurd" result the First Circuit in *Tum II* recognized would follow from the reasoning of the Secretary in that case and that of the Ninth Circuit in this case. In *Tum II*, the court observed that "[t]his extension overreaches and would lead to the absurd result that an employee who dons required equipment supplied by the company at 5:00 a.m., at his home, starts his workday for FLSA purposes at 5:00 a.m. – even though he is not required to punch in to work and does not punch in until 8:00 a.m. This plainly cannot be what Congress intended." *Tum II*, slip op. at 12-13.

The Ninth Circuit's opinion in this case also rests on the erroneous assertion that "[t]here is nothing in the statute or regulations that would lead to the conclusion that a workday may be commenced, then stopped while the employee is walking to his station, then recommenced when the walking is done." Pet. App. at 19a. The First Circuit in *Tum II*, the Tenth Circuit in *Reich*

v. IBP, and the Second Circuit in *Reich v. N.Y. City Transit Auth.*, however, found that time spent traveling to or from the place where one's principal work is performed was not rendered compensable as a result of the previous or intermittent performance of compensable duties. Consistent with this reasoning, the Secretary's regulations additionally provide that

> [w]ashing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's "principal activity." . . . This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

29 C.F.R. §790.7, n.49 (Pet. App. 92a-93a).

Even if Section 4(a)(1) of the Portal-to-Portal Act did not expressly exclude walking time from compensable activities, the walking time at issue in this litigation would clearly be excluded as preliminary and postliminary activities. Section 4(a)(2) provides that "activities which are preliminary and postliminary to said principal activity or activities" are not compensable.

The regulations promulgated following the Portal-to-Portal Act allow no other interpretation of the statute. 29 C.F.R. Section 790.7 (2003) provides in relevant part:

> (b) The words "preliminary activity" mean an activity engaged in by an employee before the commencement of his "principal" activity or activities, and the words "postliminary activity" mean an activity engaged in by an employee after the completion of his "principal" activity or activities. No categorical list of "preliminary" and "postliminary" activities except those named in the Act can be made, since activities which under one set of circumstances may be "preliminary" or "postliminary" activities, may under other conditions be "principal" activities.
>
> . . . .
>
> (f) Examples of walking, riding, or traveling which may be performed outside the workday and would normally be considered "preliminary" or "postliminary" activities are (1) walking or riding by an employee between the plant gate and the employee's lathe, workbench or other actual place of performance of his principal activity or activities. . . .
>
> (g) Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered "preliminary" or "postliminary" activities, include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks.

29 C.F.R. §790.7(b), (f), & (g) (footnote omitted). There is no meaningful distinction between the walking time at issue in this litigation and the example of "walking or riding by an employee between the plant gate and the employee's lathe, workbench or other actual place of performance of his principal activity or activities" set forth in the Secretary's regulations.

The regulations make clear that only in extraordinary circumstances will activities that are normally preliminary or postliminary be considered integral and indispensable to a principal activity. Explicit support for this

reasoning is set forth in the Secretary's interpretive regulations. As an example of a walking activity that would be compensable, 29 C.F.R. Section 790.7(d) & (f) describes a logger who, while walking into the woods, would be required to carry heavy equipment and distinguishes as a noncompensable activity the carrying of "ordinary hand tools." The Ninth Circuit's finding here that such walking activity is compensable is, therefore, not only contrary to the statute, but also contrary to the relevant interpretive regulations promulgated by the Secretary.

The Ninth Circuit's reliance on *Steiner v. Mitchell*, 350 U.S. 247 (1956), to support its finding that the walking time at issue is compensable is clearly misplaced. In *Tum II*, the First Circuit found that "nothing in *Steiner* requires" the conclusion that compensable donning commences the workday and that the workday continues until the last act of compensable doffing is performed. *Tum II*, slip op. at 13. Concurring, Chief Judge Boudin recognized the implications of the Ninth Circuit's extension of *Steiner* noting that "the more serious problem for employers arises in cases such as this one by attempts to extend *Steiner* further to walking and waiting incident to such donning and doffing. This course may greatly extend the amount of time in question and may seem especially incongruous where the amount of time spent in actually donning and doffing clothes and equipment is generally pretty minimal." *Id.* at 22-23.

In *Steiner*, the employees worked in a battery plant where their exposure to caustic and toxic chemicals required that they change clothes prior to their shift and shower in employer-provided facilities immediately after their shift. 350 U.S. at 248. The Court in *Steiner* recognized the general rule that clothes changing and showering are not compensable under "normal" circumstances.

Id. at 249. The Court found, however, that because of the uniquely hazardous conditions present, the time spent by employees showering and changing clothes was compensable. *Id.* at 249.

In its opinion in *Steiner*, the Sixth Circuit found that the showering and clothes-changing activities were compensable, specifically relying on findings by the district court that "[t]he use of sulphuric acid involves the probability of deteriorating the clothing and, in some cases, of burning the skin of those who have occasion to handle it" and that " '[s]torage battery manufacture is recognized by the experts as one of the most hazardous of the lead-using industries.' " *Steiner v. Mitchell*, 215 F.2d 171, 174 (6th Cir. 1954). Thus *Steiner*, like the regulations, makes clear that "preliminary" or "postliminary" activities will be found to be integral and indispensable to the principal activity only in narrow and unique circumstances.

The *Steiner* decision has been widely recognized as a narrow holding limited to its "unique facts." *See Tum II*, slip op. at 22 (Boudin, C.J., concurring) (observing that in *Steiner*, "the dangers were extreme and unique to the job"); *Reich v. IBP, Inc.*, 820 F. Supp. 1315 (characterizing the *Steiner* decision as "very narrow and closely tied to the extreme facts presented by that case," including the "toxicity of the materials involved in manufacturing batteries and discussed at length the dangers inherent in working with such materials"); *see also Reich v. N.Y. City Transit Auth.*, 45 F.3d 646, 650 (noting that the Supreme Court found that the activities in *Steiner* were integral and indispensable "given the high risks to employee safety"); *Aguilar v. United States*, 36 Fed. Cl. 560, 566 (1996) (stating that "[t]he exception fashioned in *Steiner* narrowly construed the phrase 'principal activ-

ity' and found only a limited exception, expressly compelled by health, hygiene, and safety considerations. *Steiner* went to great lengths to emphasize that changing clothes and showering are not compensable under 'normal' circumstances").

Any potential health risks that might arguably be faced by meat processing workers are not comparable to those present in *Steiner,* in which employees were exposed to acid, lead, and other corrosive materials. *Steiner,* 350 U.S. at 249-50. The fact that, in the very limited circumstances present in such a hazardous work environment as that described in *Steiner,* pre-shift and post-shift activities can be found to be integral and indispensable to a principal activity in no way supports a conclusion that the walking time of employees in this case is compensable. It is clear that any walking associated with the donning and doffing activities at issue in this case are neither a principal activity nor integral and indispensable to a principal activity under *Steiner.*

The Ninth Circuit's expansion of the narrow holding of *Steiner* is in direct conflict with the First Circuit's opinion in *Tum II* and the Tenth Circuit's opinion in *Reich v. IBP.* The Ninth Circuit's opinion is also in conflict with other courts that have recognized the narrow scope of the exception created by the Court's holding in *Steiner.*

As Chief Judge Boudin recognized in *Tum II,* the Secretary's position in that case with respect to walking time (and the Ninth Circuit's holding in the present case) is "a substantial step beyond *Steiner*" and that "[a]s *Steiner* itself tempers the Portal-to-Portal Act's main thrust, probably its extension should be left to the Supreme Court." *Tum II,* slip op. at 26. In short, the opinion of the Ninth Circuit in this case seeks to expand the

exception of *Steiner* to the point that it will swallow the rule established by the Portal-to-Portal Act. The Ninth Circuit's reasoning further represents a return to the same expansive definition of "compensable activities" that prompted Congress, in 1947, to enact the Portal-to-Portal amendment.

II.
THE COMPENSABILITY OF WALKING TIME IS A RECURRING AND IMPORTANT QUESTION.

Claims by meat and poultry workers for compensation for time spent on pre-shift donning and post-shift doffing activities have recently become pervasive. *See, e.g., Tum II,* Nos. 02-1679, 02-1739 (1st Cir. Mar. 10, 2004); *De Ascencio v. Tyson Foods, Inc.,* 342 F.3d 301 (3d Cir 2003); *Reich v. Manfort, Inc.,* 144 F.3d 1329 (10th Cir. 1998); *Gonzalez v. Farmington Foods, Inc.,* 296 F. Supp. 2d 912 (N.D. Ill. 2003); *Anderson v. Pilgrim's Pride,* 147 F. Supp. 2d 556 (E.D. Tex. 2001), *aff'd.,* 44 Fed. Appx. 652; *Pressley v. Sanderson Farms, Inc.* 143 Lab Cas (CCH) ¶34,262 (S.D. Tex. Apr. 23, 2001), *aff'd without published opinion* 33 Fed. Appx. 705 (5th Cir. Mar. 7, 2002).

Throughout the history of the Portal-to-Portal Act, similar claims for pre-shift and post-shift activities have pervaded both private and public employment, and the importance of the question presented is underscored by the wide variety of employers that have faced such claims. *See, e.g., Bejil v. Ethicon Inc.,* 269 F.3d 477 (5th Cir. 2001) (claims for donning and doffing of outer garments by employees engaged in the manufacture of medical supplies); *Bagrowski v. Md. Port Auth.* 845 F. Supp. 1116 (D. Md. 1994) (claim by Port Authority police officers for time spent donning uniforms); *Reich v. N.Y.*

City Transit Auth., 45 F.3d 646 (2d Cir. 1995) (Transit Authority police officers asserted claims for dog handling duties and commuting time before and after their regular work shift); *Lindow v. United States*, 738 F.2d 1047 (9th Cir. 1984) (claims for pre-shift activities by employees of Army Corps of Engineers who operated hydroelectric facilities); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 750 F.2d 47 (8th Cir. 1984) (truck drivers asserted claim for pre-trip activities); *Dunlop v. City Elec., Inc.*, 527 F.2d 394 (5th Cir. 1976) (claims asserted by electricians for compensation for various pre-shift activities); *Carter v. Panama Canal Co.*, 463 F.2d 1289 (D.C. Cir. 1972) (locomotive engineers sought compensation for walking time prior to shift); *Blum v. Great Lakes Carbon Corp.*, 418 F.2d 283 (5th Cir. 1969) (employees engaged in manufacture of carbon sought compensation for time spent performing post-shift activities); *Ralph v. Tidewater Constr. Co.*, 361 F.2d 806 (4th Cir. 1966) (operating engineers and iron workers employed in construction of Chesapeake Bay bridge sought compensation for daily boat trip to and from place of work); *Cherup v. Pittsburgh Plate Glass Co.*, 350 F. Supp. 386 (N.D. W. Va. 1972), *aff'd by* 480 F.2d 921 (4th Cir. 1973) (chlorine manufacturing employees sought compensation for pre- and post-shift clothes changing); and *Nardone v. Gen. Motors, Inc.*, 207 F. Supp. 336 (D.N.J. 1962) (claims for pre-and post-shift activities of automotive manufacturing employees). Recent claims asserted against Honda Manufacturing of Alabama and Mercedes-Benz U.S. International for compensation for pre-shift and post-shift activities demonstrate the continued prevalence of these issues. Daily Labor Report (BNA) p. A-8 (Jan. 9, 2003); Daily Labor Report (BNA) p. A-5 (Apr. 4, 2003).

As a result of the holding of the Ninth Circuit in the present case, employers would additionally face claims for walking time following what is considered to be the first compensable pre-shift activity in any case and preceding the last compensable post-shift activity at the conclusion of the workday. The Ninth Circuit's opinion in this case, therefore, creates large and unforeseen liabilities for both public and private employers. In fact, any employer that employs individuals who wear a smock, a hairnet, work gloves, or other similar types of protective garments would be subject to claims for walking and travel time associated with obtaining, donning, doffing, or disposing of such garments. As the First Circuit recognized in *Tum II*, unless walking time associated with "ordinary" and "light" equipment is excluded by the Portal-to-Portal Act, "an almost endless number of activities that precipitate the employees' essential tasks would be compensable." *Tum II*, slip op. at 16. Under the holding of the Ninth Circuit in this case, police officers and other public employees required to wear some type of uniform will likely seek compensation for walking or travel time following allegedly compensable donning activities or preceding allegedly compensable doffing activities. The unanticipated burden such claims would create for state and local governments is alone arguably sufficient to warrant grant of certiorari in this case. The compensability of the walking time at issue in this case is, therefore, a question of broad importance.

The need for clarity and consistency in interpreting the Portal-to-Portal Act, as a general matter, has been frequently acknowledged. *See, e.g., Tum II*, slip op. at 22 (Boudin, C.J., concurring) (noting with regard to applications of *Steiner* that "the precedents are not uniform"). In fact, in 2002, the Solicitor of Labor commented with

regard to the compensability of pre-shift and post-shift activities that "the court decisions are in wide conflict." (Address by Solicitor of Labor before the Industrial Relations Research Association (June 20, 2002) (transcript available at http://216.239.37.104/search?q=cache:Sn1BIHiKP9wJ:www:irra.uiuc.edu/meetings/NPF2002/Scalia'sIRRASpeech6-20-02.pdf(last visited Mar. 24, 2004))).

If not definitively resolved, the conflict created by the Ninth Circuit's opinion in this case will leave both public and private employers subject to contradictory interpretations of the FLSA and subject to vast, unforeseen, and unpredictable liabilities that are arbitrarily dependent upon the location of their operations.

CONCLUSION

For all the foregoing reasons, the Petition For Writ Of Certiorari should be granted.

Respectfully submitted,

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April 2, 2004

OPPOSITION

BRIEF

(3)

Supreme Court, U.S.
FILED
APR - 2 2004
OFFICE OF THE CLERK

No. 03-1238

IN THE

Supreme Court of the United States

IBP, INC.,

Petitioner,

v.

GABRIEL ALVAREZ, individually and as a class representative; RANULFO GUTIERREZ, individually and as a class representative; PEDRO HERNANDEZ, individually and as a class representative; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented by the parties are:

(1) Whether a writ of *certiorari* should be granted to resolve federal issues when resolution of those issues will not affect the judgment?

(2) Whether walking that occurs between compensable clothes-changing and the time employees arrive at or depart from their actual work stations constitutes non-compensable "walking ... to and from the actual place of performance of the principal activity ... **which occur either prior to [commencement], or subsequent to [cessation of] such principal activity or activities**" within the meaning of §4(a)?

(3) Whether *certiorari* should be granted to resolve supposed tension between Supreme Court opinions where the opinions and supposed tension were not argued to the Court of Appeals?

(4) Whether, after *United States v. Mead,* 533 U.S. 218 (2001), deference is due the Department of Labor's interpretation of the term "clothes" in Section 3(o), when that interpretation is embodied in an opinion letter issued by the Administrator of the Department's Wage and Hour Division, who is charged with administering and enforcing the FLSA, when Congress has provided that third parties may rely on such opinion letters, and when the opinion letter itself restores the agency's prior position?

Questions 1 and 3 are raised by respondents in this brief in opposition to the *certiorari* petition. Questions 2 and 4 are taken from IBP's petition, except that the **bold faced** type is added to complete the quotation of §4(a) of the Portal Act, 29 U.S.C. §254(a).

STATEMENT REQUIRED BY RULE 14.1

Pursuant to Supreme Court Rule 14.1, respondents state that there are two additional respondents/class representatives to the proceedings in the court whose judgment is sought to be reviewed and whose names do not appear in the caption. They are Virginia Alvarez and Maria Chavez.

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STATEMENT OF THE CASE

A. Factual Background.

In June 1998, plaintiffs brought suit alleging violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§201-216, and of Washington State law, including *inter alia* the Washington Minimum Wage Act ("MWA"), RCW chapter 49.46, and meal and rest break regulations, WAC 296-126-092.

Plaintiffs are 815 beef slaughter and processing workers at the IBP plant in Pasco, Washington. These workers "are required to wear a variety of outer garments and personal protective equipment." Pet. App. 39a (District Court Findings hereinafter "D.Ct."). The required protective equipment for knife users – the majority of the plaintiffs – includes chain-link metal equipment such as aprons, aprons with leggings, vests, sleeves, and gloves. *See id.* at 39a-40a (D.Ct.).

The Court of Appeals explained: "At the start of a shift, Pasco plant employees must gather their assigned equipment, don that equipment in one of the Pasco plant's four locker rooms, and prepare work-related tools before venturing to the slaughter or processing floors. At the end of every shift, employees must clean, restore, and replace their tools and equipment, storing all of it [in the plant]." Pet. App. 3a-4a (Court of Appeals opinion hereinafter "Ct.App.").

IBP's "30-minute" unpaid meal breaks "begin when employees receive their last piece of meat and end when employees receive their next piece of meat." Pet. App. 41a (D.Ct.). During this unpaid meal break, employees must doff and don their protective equipment and tools in order to use the restroom and cafeteria. *Id.* Washington's WAC 296-126-092 "requires that '[e]mployees be allowed a meal

period of at least 30 minutes.'" Pet. App. 30a (Ct.App.) The District Court found that "IBP knew that meal breaks in Washington had to be 'at least 30 minutes,'" but "IBP never attempted to provide the employees with a 30-minute meal break." Pet. App. 80a (D.Ct.).

B. Trial Court Judgment and Alternative Meal Break Damages Finding.

The trial court awarded state and federal damages based on time studied donning, doffing and activity segments applied to each of 258 job classifications. Thus, employees in each particular job classification were awarded donning, doffing and activity time based on the job classification's equipment and tool work pre-shift, during the meal break and post-shift. Pet. App. 36a, 55a-58a & 77a-78a (D.Ct.).

State law meal break damages were hotly contested in the trial court and on appeal. Plaintiffs argued that breaks of less than 30 minutes had to be fully compensated under state law, while IBP argued that the remedy for a sub-30 minute meal break was the minutes worked.

The trial court awarded state law meal break damages only for the minutes worked during the meal break. Pet. App. 74a (D.Ct.). **However, it made alternate findings of fact on damages should it be reversed on appeal on state law meal break damages.** *Id.*

> The trial court's judgment awarded plaintiffs:
>
> $3,098,517 ... comprised of $1,751,126 in Fair Labor Standards Act ("FLSA") overtime damages, $156,344 in Washington Minimum Wage Act ("MWA") overtime damages for periods preceding the FLSA limitations period, $286,119 in MWA minimum wage damages, and $904,928 in rest break damages under Washington law....

Appendix 2a to this Brief In Opposition (hereinafter "Resp. App.").[1] The alternative meal break damages finding was as follows:

> If the Court is reversed on appeal on its meal break ruling and Plaintiffs are held entitled to 30 minutes compensation for each meal break during which work was performed, then Plaintiffs would be able to recover $7,297,517, . . . *comprised of $5,487,561 in MWA overtime damages, $905,028 [MWA] minimum wage damages, and $904,928 in rest break damages under Washington law....*

Pet. App. 74a (D.Ct.; italics added).[2]

C. The Ninth Circuit Reversal and Remand On State Law Meal Break Damages.

On appeal, the Washington State Attorney General filed an *amicus curiae* brief urging that any meal break of less than 30 minutes had to be fully compensated. The Ninth Circuit affirmed the trial court on all issues, except that it accepted plaintiffs' and the State *amicus curiae's* meal break arguments and reversed on meal break

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[1] Respondents' Appendix contains excerpts from the Court of Appeals' briefing on agency deference issues. The excerpts contain the Table of Contents and Table of Authorities to show which cases were cited and not cited. It also contains the text, with page numbers, containing the agency deference arguments. *See* Appendix Table of Contents *infra*.

[2] Plaintiffs recovered MWA minimum wage damages; they did not have an FLSA minimum wage claim. *See* Pet. App. 28a-30a (Ct.App).

damages. The Ninth Circuit "remand[ed] for recalculation of damages consistent with this full thirty-minute remuneration approach." Pet. App. 30a-32a (Ct.App.).

Because plaintiffs cannot recover overtime damages for the same overtime work under both the FLSA and MWA, and because plaintiffs' state-law damages (as modified on appeal) greatly exceed their FLSA damages, on remand plaintiffs will recover all of their damages under state law, without any FLSA recovery. *See* Pet. App. 74a (D.Ct.)(quoted above). Plaintiffs' MWA overtime damages – with full meal break compensation – will be $5.5 million, three times as much as the $1.75 million they could have recovered for FLSA overtime claims.

D. Department of Labor Opinion Letters and The Parties' Arguments as to Deference Thereto.

In December 1997, John R. Fraser, the Department of Labor's Acting Wage and Hour Division Administrator (hereinafter "DOL Administrator") issued an opinion letter that donning and doffing meatpacking industry wire mesh and related equipment did not involve FLSA §3(o), 29 U.S.C. §203(o), "changing clothes." Resp. App. 44a-47a. In January 2001, DOL Administrator T. Michael Kerr issued an opinion letter that reaffirmed the December 1997 opinion letter and rejected prospective-only application of the letter. Resp. App. 48a-50a.

IBP argued in its Court of Appeals opening brief that the Fraser and, by implication, Kerr opinion letters were entitled to little deference because they contradicted earlier positions of the Department of Labor ("DOL"):

> Thus, the Fraser reading of Section 3(o) conflicts with the Secretary's reading, and it is well established that "[a]n agency interpretation . . . which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

Resp. App. 11a.

In June 2002, DOL Administrator Tammy D. McCutchen issued an opinion letter rejecting the Fraser and Kerr opinion letters. Pet. App. 94a-100a. DOL's then-Solicitor filed a June 2002 *amicus curiae* brief which, relying on the McCutchen opinion letter, supported IBP's §3(o) position (and supported plaintiffs' walking time position). Resp. App. 12a-18a.[3]

Plaintiffs' opening brief to the Court of Appeals agreed with IBP that the DOL Administrators' opinion letters were of limited use because they conflicted with each other, citing *INS v. Cardoza-Fonseca*. Resp. App. 26a. In its reply brief, IBP argued the withdrawn opinion letters were not entitled to deference, *citing Christensen v. Harris County*, 529 U.S. 576, 587-588 (2000) and *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944). Resp.

---

[3] The DOL Solicitor's *amicus curiae* brief did not cite case law on the issue of deference to be afforded the McCutchen § 3(o) opinion letter or the effect of prior inconsistent § 3(o) opinion letters. However, on the changing clothes issue, the Solicitor cited a regulation (29 C.F.R. § 790.8(c)), and wrote:

> *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), holds that the Secretary's interpretative regulations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *See also United States v. Mead*, 533 U.S. 218, 227-28 (2001). Resp. App. 18a n. 5.

App. 37a. IBP's reply brief did not argue for higher-than-*Christensen* deference for the 2002 opinion letter and did not cite *United States v. Mead,* 533 U.S. 218 (2001) or *Barnhart v. Walton,* 535 U.S. 212 (2002). *Id.* at 31a-37a.

The Ninth Circuit relied on *INS v. Cardoza-Fonseca* – the authority relied on by plaintiffs and IBP – in limiting the deference afforded the 2002 opinion letter, stating:

> As the Supreme Court has directed, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view," *INS v. Cardoza-Fonseca*, 480 U.S. 421, n.30 (1987), and we reject the Secretary's new, inconsistent interpretation here.

Pet. App. at 17a (Ct.App.). Thus, neither the plaintiffs, IBP nor the DOL Solicitor made the argument for which IBP seeks *certiorari, i.e.,* that higher-than-*Christensen* deference was due the DOL Administrator's 2002 opinion letter pursuant to *United States v. Mead, supra,* or *Barnhart v. Walton, supra.*[4]

[4] In its Petition for Rehearing and Petition for Rehearing En Banc, pp. 11-12, IBP cites pre-*Christensen* Supreme Court authority for the propositions that (1) an agency's interpretation of its own regulations are given "substantial deference" and (2) prior inconsistent interpretations are not necessarily fatal. Resp. App. at 42a-43a. Thus, even when moving for rehearing, IBP did not make the *Mead v. United States* or *Barnhart v. Walton* argument which it now seeks to raise in its Petition For a Writ of Certiorari.

E. Walking Time Was Held Compensable To the Extent It Occurred After the First Principal Activity and Before the Last Principal Activity.

The District Court held that walking time is compensable when it occurs after the start of the workday and before the cessation of the workday, citing *inter alia* 29 C.F.R. §790.6(b). Pet. App. 53a-54a (D.Ct.)[5] It found that walking time from the locker room to the workstation and back met this test for compensability, stating:

> Protective equipment is integral and indispensable to the work of employees required to wear such equipment. Employees who wear protective equipment begin their day upon donning their first piece of compensable protective equipment. This equipment is stored in the employee locker, as per IBP policy. ... [T]he reasonable walking time from the locker to workstation and back ... is compensable for employees required to don and doff compensable personal protective equipment stored in their lockers, as is walking time thereafter, as it occurs during the "work day."

[5] 29 C.F.R. § 790.6(b) *inter alia* provides:

> "Workday" as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period.

Pet. App. 90a-91a.

Id; accord, Pet. App. 58a (storing equipment is "integral and indispensable to the workers' duties") & 40a (slaughter employees "begin their day by picking up supplies at the supply room, then go to the locker room, where they retrieve their assigned protective equipment, steels and tools. Most slaughter employees don most of their equipment in the locker room").[6] The class members thus recovered between 2 to 3 minutes of locker to work station walk time per day. *See* Pet. App. 57a (D. Ct).

The Ninth Circuit affirmed the conclusion that walking time between locker room and work station was compensable, stating:

> The district court properly reasoned that the workday commenced with the performance of a preliminary activity that was "integral and indispensable" to the work, and the district court also properly determined that any activity occurring thereafter in the scope and course of employment was compensable. Thus, the district court included "the reasonable walking time from the locker to work station and back . . . for employees required to don and doff compensable personal protective equipment" in its "compensable" time measure.

Pet. App. 18a (Ct.App.).

[6] The District Court recognized that:

> Walking time is compensable if it occurs after the start of the work day. 29 U.S.C. § 254(a). Walking time is excluded under the Portal to Portal Act only if it occurs "either prior to the time of any particular work day at which such employee commences or subsequent to the time on any particular work day at which he ceases, such principal activity or activities." *Id.*

Pet. App. 53a, 54a.

REASONS FOR DENYING THE PETITION

I. THE FEDERAL ISSUES RAISED IN THE PETITION WILL HAVE NO IMPACT ON THE JUDGMENT IN THIS CASE.[7]

The Supreme Court "reviews judgments, not statements in opinions." *Black v. Cutter Laboratories,* 351 U.S. 292, 297-98 (1956). It follows that this Court should not accept *certiorari* when the issues it is being asked to decide would not have an impact on the judgment in that case. *See* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 231 (8th ed. 2002).

None of the issues raised by IBP's Petition will have *any* impact on the judgment in this case. Regardless of any ruling in this Court on the issues raised by IBP, the plaintiffs herein will recover all of their damages *under state law.* That can be seen from the District Court's judgment and its alternative finding. The District Court

[7] IBP limited its petition to two issues while recognizing that "respondents' complaint and the opinions below, addressed several other FLSA and State law issues that are not the subject of this petition." Pet. 7 n. 3.

The FLSA §3(o) and Portal Act §4(a) issues do not impact MWA claims because "there is no §3(o) or Portal-to-Portal equivalent under State law." Pet. App. 71a (D.Ct.). IBP did not challenge this finding on appeal nor did it preserve an argument that federal law preempts Washington wage and hour law. *See* Resp. App. 28a & n.15 (Ct.App.).

held FLSA and MWA overtime recoveries were duplicative and limited plaintiffs to recovery under either the FLSA or MWA overtime for overlapping periods of time. *See* Pet. App. 80a (D.Ct.).

The original judgment awarded FLSA overtime damages of $1,751,126 for the period that FLSA and MWA overtime claims overlapped. Resp. App. 2a. Plaintiffs recovered MWA overtime damages of only $156,344, "for periods preceding the FLSA limitations period." *Id.*[8]

The trial court, however, made the alternative finding that would apply "if the Court is reversed on appeal on its meal break ruling and Plaintiffs are held entitled to 30 minutes compensation for each meal break during which work was performed ...." Pet. App. 74a. Under this alternative finding plaintiffs' recovery would be entirely under state law because the state overtime damages would be $5,487,561 which is far in excess of the $1,751,126 FLSA overtime damages. *See id.*

The Court of Appeals reversed the District Court on its state law meal break ruling, holding plaintiffs entitled to 30 minutes compensation for each meal break during which work was performed. Pet. App. 32a (Ct.App). Thus, plaintiffs' recovery is entirely supported by an independent and adequate state law ground. Indeed, the damages awarded to plaintiffs under state law will be the *only ones* set forth in the judgment on remand. Plaintiffs will receive a judgment based entirely on state law whether the Ninth Circuit is affirmed or is reversed on the issues raised in this petition. Any opinion this Court renders on the federal

[8] The FLSA claims exceeded the MWA claims because (1) plaintiffs recovered FLSA liquidated damages and (2) state meal break damages were limited to actual minutes worked, *i.e.*, the same as FLSA meal break damages. *See* Pet. App. 60a-61a, 74a, 78a-79a & 80a (D.Ct.).

issues raised by Petitioner will therefore be wholly advisory.

II. THE WALKING TIME ISSUE IS FACT BOUND AND NOT SUBJECT TO A MATURE CONFLICT AMONG THE CIRCUITS.

A. The Ninth and Tenth Circuits Agree That Pre- and Post-Production Walking Time May Be Compensable Under §4(a) of the Portal Act.

Section 4(a) of the Portal Act, 29 U.S.C. §254(a), excludes from hours worked only walking activities "which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." Pet. App. 88a. Federal regulations interpret §4(a) to mean that "periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted." 29 C.F.R. §790.6(a).

The Ninth Circuit herein and the Tenth Circuit, in *Reich v. IBP, Inc.*, 38 F.3d 1123, 1127 (10th 1994), *affirming* 820 F.Supp. 1315 (D.Kan. 1993), each accepted the proposition that the walking is compensable between the first and last principal activity, even if the principal activity is not production work.

Herein, after reviewing evidence from a 20-day trial, the District Court found that the workday began and ended at the locker room, where the workers retrieved, donned, doffed and stored equipment and tools in accordance with IBP policy. Pet. App. 53a-54a & 57a-58a

(D.Ct.). As a result, plaintiffs recovered between 2 to 3 minutes of daily walk time between the locker and work station. *Id.* The Ninth Circuit affirmed the compensability of walk time. Pet. App. 18a-19a (Ct.App.). Based on findings from the evidence at trial, both the District Court and the Ninth Circuit agreed that walking time between the locker room and work stations was compensable because the workday had commenced and ended in the locker room. Both relied on 29 C.F.R. §790.6. Pet. App. 18a (Ct.App.) & 54a (D.Ct.).

In *Reich v. IBP, supra,* after a 3-day trial covering 11 IBP beef and pork plants, the trial court concluded that the first and last principal activity occurred at the knife room, when employees retrieved sharpened knives pre-shift and returned used knives post-shift. 820 F.Supp. at 1325. Therefore, the trial court held walk time between the knife room and work stations was compensable as occurring during the workday, citing *inter alia* 29 C.F.R. §790.6. *Id.* On appeal, the Tenth Circuit "agree[d] with the district court's determination on the issues of compensable working time ... for substantially the reasons set forth by the district court." 38 F.3d at 1125. Following remand and appeal, the Tenth Circuit affirmed the damages award which included three minutes of compensable pre-shift and post-shift walking time. *Metzler v. IBP, Inc.,* 127 F.3d 959, 963 & 966 (10th Cir. 1997), *aff'g Reich v. IBP,* 3 BNA Wage & Hour Cas.2d 324, 329 (D.Kan. 1996).

IBP argues, at Pet. 12, that "as the Tenth Circuit described it, even compensable clothes changing is not the 'first and last principal activit[y] of the workday which would commence and toll the running of the timeclock' such that all walking time between clothes changing and the work station is compensable. *Reich [v. IBP]*, 38 F.3d at 1127." In fact, the Tenth Circuit, 38 F.3d at 1127, was

describing what "the district court nevertheless declined to hold." The issue before the Tenth Circuit was not whether compensable clothes changing **could** start and end the workday, but rather whether to reverse trial court findings that were inconsistent with awarding locker to knife room walking time. *See id.*; 820 F.Supp. at 1321 (variations in were and when donning and doffing occurred) & 1326 (locker room use primarily for benefit of employees).

The Tenth Circuit affirmed fact-specific trial court findings about locker to knife room walking time; it did not adopt a legal principle that walking time was compensable only while production work was occurring. We know this because, as is discussed *supra,* the district court held pre- and post-production walking time from the knife room to the work station and back was compensable, and the Tenth Circuit affirmed these walking time findings twice -- in *Reich v. IBP* and again in *Metzler v. IBP.*

The Tenth Circuit and Ninth Circuit decisions are therefore fully consistent. Each upheld walking time awards based on its trial court's fact-bound findings regarding the workday's first and last principal activity. Each affirmed findings that treated non-production activity as starting and ending the workday for §4(a) walking purposes.

B. The First Circuit's Recent Opinion Presents an Immature Dispute Among the Circuits That Would Benefit From Further Development.

IBP argues that "the First Circuit squarely rejected the very reasoning the Ninth Circuit adopted" citing *Tum v. Barber Foods, Inc.*, 331 F.3d 1, 6 (1st Cir. 2003). Pet. 12. However, the First Circuit withdrew the opinion relied on by IBP and replaced it with *Tum v. Barber Foods, Inc.*, ___ F.3d. ___, 2004 WL 437347 (1st Cir. March 10, 2004). The

new opinion does not squarely address the argument adopted by the Ninth Circuit that 29 C.F.R. §790.6 makes compensable walking time that occurs between the first and last principal activity. Pet. App. 18a (Ct.App.). Indeed, the First Circuit does not address 29 C.F.R. 790.6 at all. Rather, it relies largely on footnote 49 in 29 C.F.R. §790.7 without explaining the precise interpretation of that footnote or its connection to other regulations such as §790.6.[9]

Footnote 49 quotes from colloquy between Senators Cooper and McGrath to the effect that changing of clothes may in certain circumstances be an integral part of the employee's principal activity. It goes on to say that the fact that such clothes changing would be excluded from §4(a) of the Portal Act does "not necessarily mean, however," that travel between the clothes changing place and the actual place of performance of the specific work would also be excluded from §4(a) of the Portal Act. To say that something is not necessarily excluded means, at a minimum, that it may be excluded. The question then becomes under what circumstances will travel between the clothes changing place and the actual place of performance of the specific work be excluded from §4(a) of the Portal Act and under what circumstances will such travel be included as being subject to §4(a) of the Portal Act. Both the legislative history quoted at footnote 47 of §790.7 and

[9] *Tum* relies on *Anderson v. Pilgrim's Pride Corp.*, 147 F.Supp.2d 556, 563, (E.D. Tex. 2001), *affd. in an unpublished opinion,* 2002 WL 1396949 (5th Cir. 2002). However, the court concluded on the facts presented therein that "the clothes changing activity required of the line employees in *this* case is not 'integral and indispensable' to their principal jobs." (emphasis added) Without finding clothes changing to be a principal activity, no circuit court would find post-changing walking time to be compensable. The cases are fact specific.

the discussion at §790.6 help answer that question, but the First Circuit opinion did not refer to those sources.

In any event, any conflict between the conclusions reached by the First and Ninth Circuits is a narrow one that may well resolve itself with further circuit court review. Such review may reconcile 29 C.F.R. §790.6 and footnote 49 in 29 C.F.R. §790.7 by developing criteria for distinguishing between compensable and non-compensable walking time. Meanwhile, this does not present an issue of significant national importance requiring immediate Supreme Court consideration. The few opinions to date are intensely fact-bound. They involve only a few industries and small amounts of time. The circuits should be allowed an opportunity to consider each other's reasoning and to develop a consensus before this Court decides whether or not to take up the issue.[10]

[10] The concurrence by Chief Judge Boudin in *Tum* argues that:

> two positions are juxtaposed. One is the Secretary's mechanical combination of *Steiner* with a rigid "everything after is work" principle. The other is to treat required donning and doffing as compensable where more than de minimis but, where it is not, leaving both it and any associated walking and waiting time as non-compensable. Neither outcome is impossible analytically and neither is clearly dictated by Supreme Court precedent or underlying policy.

2004 WL 437347 at 9 (emphasis in original.)

The concurrence further suggests that: "it may be time for the Supreme Court to have another look at the problem." *Id.* at 10. However, as discussed above, those are not the only two positions. An intermediate position can reasonably be found pursuant to 29 C.F.R. §§ 790.6 and 790.7. Moreover, any virtues of this Court reviewing the

C. The Ninth Circuit's Analysis Is Correct.

In any event, the Ninth Circuit correctly applied the applicable federal law. The exclusion in §4(a) of the Portal Act is limited by the statutory language to activities "which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities."

A further source of authority is the Secretary of Labor's Portal Act interpretive regulations which were adopted in 1947 and are contained at 29 C.F.R. §§790.1 – 790.22. Section 790.4(b) states the basic rule that §4(a) activity is excluded only if it occurs before or after all principal activities.[11] The regulations draw heavily on the

---

issues discussed in the concurrence, would be largely lost in accepting review in a case such as this one in which the result of this Court's analysis would not affect the judgment in the case.

[11] 29 C.F.R. § 790.4 states:

> (b) Under section 4 of the Portal Act, an employer who fails to pay an employee minimum wages or overtime compensation for or on account of activities engaged in by such employee is relieved from liability or punishment therefor if, and only if, such activities meet the following three tests:
>
> (1) They constitute "walking, riding, or travelling" of the kind described in the statute, or other activities "preliminary" or "postliminary" to the "principal activity or activities" which the employee is employed to perform; and
>
> (2) **They take place before or after the performance of all the employee's "principal activities" in the workday ....**

(Emphasis added).

legislative history to the Portal Act, which is cited in footnotes. The colloquy between Senators Cooper and McGrath explains that the Portal Act term "principal activities" includes activities which are an integral part of a principal activity and is referred to directly or indirectly in footnotes 47, 49, 59, 60, 63, 64, 65, 66, and the accompanying text. This legislative history demonstrates that Congress intended to eliminate "from compensation walking, traveling, riding, and other activities which are <u>not</u> an integral part of the employment for which the worker is employer [sic]." 93 Cong. Rec. 2299 quoted at 29 C.F.R. §790.7 fn. 47. (Emphasis added.) This needs to be read together with 29 C.F.R. §790.6(b) which defines the workday "in general" to mean the period between commencement and completion of an employee's principal activity or activities and §790.4 which limits the Portal Act to activities that take place before or after all of the employee's principal activity in the workday.

In *Steiner v. Mitchell*, 350 U.S. 247 (1956), the Supreme Court agreed with the Sixth Circuit's "holding that the term 'principal activity or activities' in Section 4 embraces all activities which are 'an integral and indispensable part of the principal activities,' and that the activities in question fall within this category." 350 U.S. at 252-53. The Supreme Court relied heavily on "the colloquy between several Senators and Senator Cooper, a sponsor of the bill and a member of the three-man subcommittee that held hearings of the Committee on the Judiciary which reported it." 352 U.S. at 254 & n.5 & 256-259 (appendix containing colloquy).

This Court's conclusion in *Steiner* was:

> We, therefore, conclude that activities performed either before or after the regular work shift, on or off the production

> line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by §4(a)(1)."

352 U.S. at 255. IBP argues:

> *Steiner's* reference to activities "not specifically excluded by Section 4(a)(1)" can only be understood as a clarification that an "integral and indispensable" – and therefore compensable – activity does not render compensable all walking that occurs between that "integral and indispensable" activity and the work station.

Pet. 13. IBP reads too much into the "not specifically excluded" phrase. *Steiner* acknowledged that activities which are an integral and indispensable part of principal activities may nevertheless be specifically excluded by §4(a)(1), but was not attempting to analyze what §4(a)(1) means. *Steiner* never addressed the Secretary's regulations which define "workday" in terms of principal activities and which adopted the legislative history that "principal activities" include activities which are an integral part of a principal activity. 29 C.F.R. §790.6(b), §790.7, n. 47. There is thus no basis to conclude that in *Steiner* this Court was rejecting that interpretation.

In this case, the District Court found that work occurring in the locker was an integral and indispensable part of the principal activities and occurred during the workday and concluded that walking to and from the locker was therefore compensable. Pet. App. 40a, 54a & 58a (D.Ct.). These findings were based on the evidence and are

supported by the Secretary's interpretative regulations. *Steiner v. Mitchell* does not undermine the Secretary of Labor's Portal Act regulations, nor is it inconsistent with the Ninth Circuit's opinion herein.

III. CERTIORARI ON *MEAD* MODIFICATION OF *CHRISTENSEN* IS INAPPROPRIATE WHERE NOBODY ARGUED THE ISSUE AND THE NINTH CIRCUIT NEVER ADDRESSED IT.

This Court's practice is to decide cases only on grounds that were (a) raised *and* (b) considered in the Court of Appeals *and* (c) included in the question on which the Court granted *certiorari*. *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998); *Owasso Ind. School Dist. v. Falvo*, 534 U.S. 426, 431 (2002) As articulated in *FTC v. Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983):

> Respondent did not raise this issue before the District Court or the Court of Appeals and we decline to address it.

IBP asks this Court to consider whether the Ninth Circuit gave proper deference to the 2002 opinion letter in light of *United States v. Mead*, *supra*. Pet. "i". IBP argues that *Mead*, *supra*, and *Barnhart v. Walton*, *supra*, modify *Christensen v. Harris County*, 529 U.S. 576 (2000), which held that less formal agency interpretations are not entitled to the deference set forth in *Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Pet. 19-26.

Mead, Barnhart, and *Chevron* had all been decided prior to June, 2002 when the appellate briefing in this case began. Yet IBP never cited *Mead*, *Barnhart*, or *Chevron* in any Ninth Circuit briefing. To the contrary, IBP relied on *Christensen* having "recently clarified that an agency's

interpretation of a statute contained in an opinion letter does not warrant the usual deference given to agency interpretations … ." Resp. App. 10a (opening brief); *see also,* Resp. App. 37a (reply brief).

Either IBP was unaware that these later cases may have modified *Christensen* or it chose not to make the argument. In either event, these cases and arguments based thereon were not presented to the Ninth Circuit, and, consequently, the Ninth Circuit did not address them in its opinion below. Indeed, both sides used their opening briefs to argue that conflicting agency opinions have little weight, citing *INS v. Cardoza-Fonseca*, *supra*, Resp. App. 11a (IBP's opening brief) & 26a (Plaintiffs' opening brief). IBP failed to use its reply brief to argue that the newest conflicting opinion was entitled to greater deference under either *Mead* or *Barnhart.* Resp. App. 37a. Given the parties' argument it is hardly surprising that the Ninth Circuit relied on *INS v. Cardoza-Fonseca*. Pet. App. 17a n. 9.

Having lost in the Court of Appeals, IBP now argues for the first time that *Mead*, *Barnhart*, and *Chevron* – which it never cited to the Court of Appeals – create an issue which should be decided by this Court. Granting *certiorari* on this issue would shut the lower courts out of the decision making process, prevent this Court from getting the benefit of the Court of Appeals' analysis, and be inconsistent with this Court's practice described above.

IV. THERE IS NO CIRCUIT CONFLICT OVER §3(o) AND PROTECTIVE EQUIPMENT; THE NINTH CIRCUIT GAVE APPROPRIATE DEFERENCE TO THE 2002 OPINION LETTER.

The Ninth Circuit in *Alvarez* pointed out that no Court of Appeals decision had addressed the issue of whether putting on and taking off protective gear constitutes "changing clothes" as that term is used in the FLSA. *See* Pet. App. 14a-15a. (citing *Nguyen v. Excel Corp.*, 197 F.3d 200, 203 (5th Cir. 1999) and noting that the plaintiffs there raised a similar §3(o) safety gear claim but the Court did not reach the issue). IBP relies on *Bejil v. Ethicon, Inc.*, 269 F.3d 477, 480 n.3 (5th Cir. 2001) as the source of a circuit conflict on the §3(o) issue. Pet. 18. However, the clothes at issue in *Benjil* were sanitary garments such as lab coats, facial hair covers, and shoe covers. *Bejil*, 269 F.3d at 479. Those items are not fairly comparable to the mesh, scabbards, other protective equipment and tools which were the subject of the Ninth Circuit's analysis. Indeed, the District Court in this case held that items comparable to the items at issue in *Benjil*, *e.g.*, frocks, hair nets, boots and safety glasses *were* subject to §3(o). Pet. App. 56a-57a & n.9 (D.Ct.). Plaintiffs did not appeal that ruling. Thus, there is no conflict between the *Alvarez* and *Bejil* opinions.

Contrary to IBP's rather hyperbolic phrasing, the Ninth Circuit neither "utterly disregard[ed]" nor ignored the DOL's §3(o) interpretations. Pet. 26. Rather, the Court considered the interpretations together with applicable dictionary definitions, principles of statutory construction, and other regulations of the Secretary of Labor. Pet. App. 14a-17a (Ct.App.). Citing this Court's opinion in *INS v. Cardoza-Fonseca* (which was relied on by both parties),

the Court rejected "the Secretary's new, inconsistent interpretation here." *Id.*, n. 9. Both *United States v. Mead Corp.*, *supra* and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), list relevant principles a court should consider in determining what weight to be given to informal agency interpretation including the thoroughness of consideration, its consistency, and its power to persuade. *Skidmore*, 323 U.S. at 140; *Mead*, 533 U.S. at 235. The Ninth Circuit's analysis was entirely consistent with those principles.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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April 2, 2004

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

[Filed September 14, 2001]

No. CT-98-5005-RHW

GABRIEL ALVAREZ et al.,

Plaintiffs,

v.

IBP, INC.,

Defendant.

JUDGMENT

This action came on for trial before this Court, the Honorable Robert H. Whaley, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED:

That the Plaintiffs, Gabriel Alvarez, *et al.* recover of the Defendant, IBP, Inc. the sum of $3,098,517, with interest thereon at the rate provided by 29 U.S.C. § 1961, 3.43%. This judgment is based on damages calculated through May 14, 2000, and is comprised of $1,751,126 in Fair Labor Standards Act ("FLSA") overtime damages, $156,344 in Washington Minimum Wage Act ("MWA") overtime damages for periods preceding the FLSA limitations period, $286,119 in MWA minimum wage damages, and $904,928 in rest break damages under Washington law (which includes rest break prejudgment interest).

The Court finds that Plaintiffs are entitled to their costs of action and reasonable attorneys' fees and costs under applicable state and federal law. Plaintiffs are directed to file a motion to establish these attorneys fees within 4 weeks of entry of this judgment and to file a cost bill with the Clerk pursuant to Fed. R. Civ. P. 54(d)(1).

IT IS SO ORDERED. The District Court Executive is directed to enter this order and to provide copies to counsel.

DATED this 14th day of September 2001.

/s/ Robert H. Whaley
ROBERT H. WHALEY
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

[Filed June 3, 2002

CA Nos. 02-35042 & 02-35110

GABRIEL ALVAREZ, et al., individually and as class representatives,
Plaintiffs/Appellees/Cross-Appellants,

v.

IBP, INC.,
Defendant/Appellant/Cross-Appellee.

CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON
(Hon. Robert H. Whaley)
No. CT-98-5005-RHW

APPELLANT'S OPENING BRIEF

Michael B. King
Barbara J. Duffy
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* * * *

[20] To avoid this result, the District Court appears to have endorsed the reading given to Section 3(o) by Mr. John Frasier [sic], Acting Administrator of DOL's Wage and Hour Division, in an opinion letter issued in December 1997. Like the District Court, **[21]** Acting Administrator Frasier opined that protective "equipment" worn by beef processing plant employees does not constitute "clothes" under Section 3(o). See Ex. 64 (ER 274-77) (Frasier Letter). The Supreme Court has recently clarified that an agency's interpretation of a statute contained in an opinion letter does not warrant the usual deference given to agency interpretations, because such letters are not adopted after formal adjudication or rule-making procedures and therefore lack the force of law. Christensen v. Harris County, 529 U.S. 576, 587-88 (2000).. "[I]nterpretations contained in formats such as opinion letters are 'entitled to respect' . . . but only to the extent that those interpretations have the 'power to persuade.'" Id. at 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (emphasis added)).

The Frasier letter's interpretation of Section 3(o) is not persuasive. To begin, the letter's reading of the term "clothes" contradicts the plain meaning of the statutory language. The Acting Administrator that his interpretation of "clothes" did comport with the word's plain meaning, asserting that "common usage dictates - that 'clothes' refer to apparel, not to protective safety equipment which is generally worn over such apparel and may be cumbersome in nature." Ex. 64 (ER 277) (Frasier letter at 2). But (to take just one example from everyday life) a winter coat is also "generally worn over . . . apparel," and such coats are often "cumbersome; in **[22]** nature . . . ." That the Frasier letter's definition of "clothes" would exclude winter coats – and every other item of "covering for the human body" that is worn over other appeal and may be cumbersome in nature – should be

sufficient to demonstrate the near –frivolous quality of the letter's purported "plain meaning" interpretation of the term "clothes."

The Frasier letter's interpretation also conflicts with the Secretary of Labor's interpretation applied in the enforcement litigation against IBP. The Secretary expressly excluded IBP's union plants based on the application of Section 3(o). If the Secretary believed that protective clothing of the sort at issue here was not "clothes" under Section 3(o), why would the Secretary have excluded IBP's union plants from the enforcement action because of Section 3(o)? Plainly, the Secretary did consider the clothes at issue here to be "clothes" under Section 3(o), as well. Thus, the Frasier reading of Section 3(o) conflicts with the Secretary's reading, and it is well established that "[a]n agency interpretation . . . which. conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

* * * *

APPENDIX C

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

[Filed June 13, 2002]

Nos. 02-35042; 02-35110

GABRIEL ALVAREZ, RANULFO GUTIERREZ, PEDRO HERNANDEZ, MARIA MARTINEZ, RAMON MORENO, ISMAEL RODRIQUEZ, VIRGINIA ALVAREZ and MARIA CHAVEZ, individually and as class representatives,

Plaintiffs/Appellees/Cross-Appellants,

v.

IBP, INC., a Delaware corporation,

Defendant/Appellant/Cross-Appellee.

On Appeal from the
United States District Court
For The Eastern District of Washington

BRIEF FOR THE SECRETARY OF LABOR
AS *AMICUS CURIAE*

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[13] The Secretary has consistently interpreted the Portal Act to provide that changing clothes is compensable as an integral part of the employee's principal activity if the principal activity cannot be performed without putting on and taking off the clothes **[14]** on the employer's premises, i.e., if it is not merely a "convenience" to the employee. *See* 29 C.F.R. 790.8(c) (first promulgated at 12 Fed. Reg. 7655 (Nov. 18, 1947)).[5] The interpretative regulations further explain that "[s]uch a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work." *Id.* at 790.8(c) n.65. *See also* 29 C.F.R. 790.7(g) n.49 ("Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's principal activity."). The Supreme Court in *Steiner* specifically upheld these regulations, noting that they were ratified by Congress in 1949 when former § 16(c) of the FLSA was enacted. *See* 250 U.S. at 255 nn.8 and 9. Section 16(c) provided that existing Wage-Hour regulations or interpretations, not inconsistent with the amendments, remained in effect. *See* Note following 29 U.S.C. 208, 63 Stat. 920 (1949) (footnote omitted).

* * * *

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[5] *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), holds that the Secretary's interpretative regulations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *See also United States v. Mead*, 533 U.S. 218, 227-28 (2001).

APPENDIX D

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

[Filed July 22, 2002]

CA Nos. 02-35042 & 02-35110

GABRIEL ALVAREZ, RANULFO GUTIERREZ, PEDRO HERNANDEZ, MARIA MARTINEZ, RAMON MORENO, ISMAEL RODRIQUEZ, VIRGINIA ALVAREZ and MARIA CHAVEZ, individually and as class representatives,

Plaintiffs/Appellees/Cross-Appellants,

v.

IBP, INC., a Delaware corporation,

Defendant/Appellant/Cross-Appellee.

Cross-Appeal from the
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
(District Court No. CT-98-5005-RHW)

PLAINTIFFS/APPELLEES/
CROSS-APPELLANTS' BRIEF

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* * * *

[19] The June 2002 opinion letter (Appendix A to Amicus Brief) is the work of a new Administrator appointed by a new administration. It squarely conflicts with **[20]** the 1997 and 2001 opinion letters issued by prior Administrators in a prior administration. (Exhibit 64, ER 275-277; CR 639, SER 74) Both sides now have an opinion letter. Under *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987), the net effect of these conflicting interpretations is to cancel them out as useful sources of statutory interpretation apart from their own persuasive force. The new interpretation is of little, if any, persuasive force for the reasons discussed above. (Footnote omitted.)

* * * *

APPENDIX E

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

[Filed October 4, 2002]

CA Nos. 02-35042 & 02-35110

GABRIEL ALVAREZ, et al., individually
and as class representatives,
Plaintiffs/Appellees/Cross-Appellants,

v.

IBP, INC.,
Defendant/Appellant/Cross-Appellee.

CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON
(Hon. Robert H. Whaley)
No. CT-98-5005-RHW

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* * * *

[8] Plaintiffs seek to diminish the importance of the June 6, 2002 letter by asserting "[b]oth sides now have an opinion letter." Pltfs' br. at 20. However, this assertion ignores that the earlier letters have been withdrawn, and were never entitled to any deference even before the June 6, 2002 letter. The earlier letters represented a sharp departure from prior DOL practice and case law rejecting any distinction under section 3(o) between "clothing" and so-called "safety equipment." *See* Appendix A (June 6, 2002 DOL Op. Letter at 1) ("[T]he construction of section 3(o) enunciated in the December 3, 1997 Opinion Letter had never previously been put forward by the Administrator;" numerous DOL officials historically applied section 3(o) to exclude "from hours worked the time spent by employees putting on, taking off and cleaning protective equipment."); *Saunders*, *supra*. The withdrawn letters are also inconsistent with the plain and unambiguous statutory language, and conflict with prior case law. For these reasons, they are not entitled to any deference. *See Christensen v. Harris County*, 529 U.S. 576, 587-88 (2000); *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944). Plaintiffs' continued reliance on the December 1997 opinion letter therefore is completely misplaced.

* * * *

APPENDIX F

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

[Filed August 25, 2003]

CA Nos. 02-35042 & 02-35110

GABRIEL ALVAREZ, et al., individually and as class representatives,
Plaintiffs/Appellees/Cross-Appellants,

v.

IBP, INC.,
Defendant/Appellant/Cross-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON
HON. ROBERT H. WHALEY, JUDGE
CASE NO. CT-98-5005-RHW

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

William A. Norris
Joel M. Cohn
Alison L. Gray
AKIN GRUMP STRAUSS
HAUER & FELD LLP

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[11] The panel was required to treat the DOL's interpretation of the statute with "substantial deference." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). As the Supreme Court has explained, [the court's] task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation. . .." Id. (citations and quotations omitted). Substantial deference-is especially warranted when, as here, **[12]** "the regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns. '" Id. (citations omitted).[6]

The panel did not cite *Thomas Jefferson* or accord the DOL's interpretation any deference, let alone "substantial" deference. Instead, it dismissed the DOL's position on the ground the agency took a different position in a 1997 letter that, has since been withdrawn. The panel adopted this 1997 position - one the DOL characterizes as contrary to the agency's otherwise consistent interpretation of section 3(o) (Addendum A at 1) - in reliance on a single case, INS *v. Cardoza-*

---

[6] This Court has repeatedly upheld the rule that an "agency's interpretation of regulations it is charged with administering is entitled to a high degree of deference and will be upheld as long as it is not plainly erroneous or inconsistent with the regulation." *E.g., Wards Cove Packing Corp. v. Nat'l Marine Fisheries Serv.*, 307 F.3d 1214,1218 (9th Cir. 2002); *Rainsong Co. v. Federal Energy Reg. Comm 'n.*, 106 F.3d 269,272 (9th Cir. 1997); *Rendleman v. Shalala*, 21 F.3d 957, 961 (9th Cir. 1994).

Fonseca, 480 U.S. 421, 446 n.3 (1987). Slip op. at 10707 n.9. The *Cardoza-Fonseca* court observed that inconsistent agency interpretations may be entitled to less judicial deference than consistently held positions, in a case where the agency proffered a view not only inconsistent with its former interpretation, but at odds with the plain language of the statute at issue there. 480 U.S. at 446. By contrast, **[13]** the plain language of section 3(o) makes no distinction between clothing that is protective and clothing that is not.

Nor did the panel cite more recent Supreme Court cases clarifying that shifts in policy are not fatal to the legitimacy of an administrator's interpretation. *In Rust v. Sullivan,* 500 U.S. 173 (1991), for example, the Court stated that it had "rejected the argument that an agency's interpretation 'is not entitled to deference because it represents a sharp break with prior interpretations' of the statute in question." Id. at 186 (citation omitted). "[A] revised interpretation deserves deference" because! "'the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.'" Id. (citations omitted); *see also Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996)* ("The mere fact that an agency interpretation contradicts a prior agency position is not fatal. Sudden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation, may be 'arbitrary, capricious [or] are, abuse of discretion.' But if these pitfalls are avoided, change is not invalidating[.]") (citations omitted).

* * * *

APPENDIX G

U. S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

Dec. 3, 1997 [SEAL]

George R. Murphy, Esq.
General Counsel
United Food & Commercial Workers
International Union
1775 K Street, N.W.
Washington, D.C. 20006-1599

Roger J. Miller, Esq.
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Omaha, Nebraska 68102

Dear Mr. Murphy and Mr. Miller:

This responds to your respective requests for an opinion concerning the application of section 3(o) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 203 (o), to employees in the meat packing industry. According to your letter, the employees in question perform the following preliminary and postliminary activities: sharpening knives, waiting in line at wash stations, cleaning equipment, and putting on

and taking off required safety gear. You specifically ask whether section 3(0) allows for the exclusion of any of these activities from hours worked pursuant to the express terms or by custom or practice under a collective bargaining agreement.

Section 3(o) of the FLSA states as follows:

> Hours worked. – In determining for the purposes of sections 6 and 7 the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

29 U.S.C. 203 (o) (emphasis added). Since section 3 (o) provides an exemption from the broad, remedial provisions of the FLSA, it must be read narrowly. *See Arnold v. Ben Kanowsky, Inc.*, 361 U. S. 388, 392 (1960).

The putting. on, taking off, and washing of protective safety equipment are compensable activities under the FLSA if they are integral to an employee's principal activities, regardless of the fact that they may be performed either before or after the employee's regular work shift. *See Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994) (where court concluded that the time spent by employees in putting on, taking off, and washing protective safety equipment that is unique to the

meat packing industry -- e.g., a mesh apron, a plastic belly guard, mesh sleeves or plastic arm guards, wrist wraps, mesh gloves, rubber gloves, polar sleeves, rubber boots, a chain belt, a weight belt, a scabbard, and shin guards -- was compensable). *See generally* 29 C.F.R. 790.8(b) and (c). It is our view that by its very terms section 3(o) does not apply to the putting on, taking off, and washing of protective safety equipment, and, therefore, time spent on these otherwise compensable activities cannot be excluded from hours worked pursuant to the express terms or the custom or practice under a collective bargaining agreement.

The plain meaning of "clothes" in section 3(o) does not encompass protective safety equipment; common usage dictates that "clothes" refer to apparel, not to protective safety equipment which is generally worn over such apparel and may be cumbersome in nature. In regard to the meaning of "washing," the legislative history specifically states that the term refers only to washing oneself. The conference agreement limited the section 3(o) exemption "to time spent by the employee in changing clothes and cleaning his person at the beginning or at the end of each workday." *See* H.R. Conf. Rep. No 1453 (1949), *reprinted in* 1949 U.S.C.C.A.N. 2251, 2255 (emphasis added). *See also* 95 Cong. Rec. 14,875 (1949) (speaking of the conference agreement as limiting the application of section 3(o) "to time spent in changing clothes or washing (including bathing) at the beginning or end of each workday") (emphasis added); 29 C.F.R.

790.7(g) (discussing preliminary and postliminary activities such as "washing up or showering," which, under the Portal-to-Portal Act, would not generally be considered to be compensable unless deemed to be an integral part of an employee's principal activity) (emphasis added). Thus, section 3(o) cannot be read so broadly as to include the cleaning of protective safety equipment.

Therefore, the phrase "changing clothes or washing" in section 3(o) does not include the putting on, taking off, or washing of that protective safety equipment utilized in the meat packing industry which is integral to the performance of an employee's principal activity. Moreover, the phrase clearly does not encompass the sharpening of knives.

We trust that the above is responsive to your individual inquiries.

Sincerely,

/s/John R. Fraser
John R. Fraser
Acting Administrator

APPENDIX H
2001 WL 58864 (DOL WAGE-HOUR)

Wage and Hour Division
United States Department of Labor

Opinion Letter
Fair Labor Standards Act (FLSA)
January 15, 2001

This responds to your request that we clarify opinion letters issued on December 3, 1997, and February 18 1998, interpreting Section 3(o) of the Fair Labor Standards Act, 29 U.S.C. 203(0). As you know, we met with representatives of the *** to discuss issues you raised relating to implementation of the interpretation expressed in the opinion letters. We have carefully considered the recommendations offered during those meetings as well as the supporting documents submitted by the parties.

As we have previously indicated, prior to issuing the December 3, 1997, opinion letter, the Administrator of the Wage and Hour Division had never issued a written interpretation or implemented an administrative practice or enforcement policy regarding the proper construction of the phrase "changing clothes and washing" in Section 3(0) of the FLSA. Some regional and district officials of the Wage and Hour Division and the Office of the Solicitor, however, in their enforcement of some cases, chose to apply Section 3(0) if a bona fide collective bargaining agreement excluded from hours worked the time spent by employees putting on, taking off and cleaning protective equipment.

Accordingly, when the Department filed suit under the FLSA against Excel Corporation in July 1998, on behalf of unionized meatpacking employees working at the company's Beardstown, Illinois, plant (later amended to include Excel's Ft. Morgan, Colorado, plant) we exercised prosecutorial discretion to seek back wages starting from March 1998 -- the date when Excel received a copy of the December 3, 1997, opinion. We will adhere to an enforcement position to seek relief for unionized meatpacking employees for their time spent putting on, talking off and washing protective equipment beginning from the date the employer received or should have received notice of the December 3, 1997, opinion. We do not believe it is appropriate, however, further to limit the relief we may seek to work performed after expiration of collective bargaining agreements in effect on December 3, 1997, that excluded these pre-shift and post-shift activities from compensable time. This exercise of prosecutorial discretion does not imply that the opinion letters constituted a change in the law or in the Administrator's interpretation of the law.

In addition, I would like to take this opportunity to reiterate, as we discussed in our earlier meetings, that under the FLSA and the Portal-to-Portal Act, it is the Department's longstanding position that, as a general matter, compensable hours worked include all time from the moment each employee performs the first principal activity of the employee's workday until the last principal activity is concluded, less any bona fide meal periods or bona fide off-duty time. An employer must compensate its employees for any activity that is an integral and indispensable part of the employee's principal activities, including the putting on, taking off and cleaning of personal protective equipment, clothing or gear that is required by law, by rules of the

employer or by the nature of the work. It should also be noted that the meal period may not include any time performing "work," and that time spent donning and doffing of personal protective equipment, clothing or gear before or after the meal period is compensable.

Also, a number of meatpacking companies have asked the Department if it would be permissible to pay employees wages based on an average amount of time that all employees work. I would like to reiterate that in order to comply with the FLSA and its implementing regulations (see 29 C.F.R. 516.2), a company must record and pay for each employee's actual hours of work, including compensable time spent putting on, taking off and cleaning his or her protective equipment, clothing or gear.

I look forward to working together to achieve compliance in this industry, and appreciate your interest in these important matters.

Sincerely,

T. Michael Kerr Administrator

APPENDIX I

29 CFR § 790.4 Liability of employer; effect of contract, custom, or practice.

(a) Section 4 of the Portal Act, quoted above, applies to situations where an employee, on or after May 14, 1974, has engaged in activities of the kind described in this section and has not been paid for or on account of these activities in accordance with the statutory standards established by the Fair Labor Standards Act.[16] Where, in these circumstances such activities are not compensable by contract, custom, or practice as described in section 4, this section relieves the employer from certain liabilities or punishments to which he might otherwise be subject under the provisions of the Fair Labor Standards Act.[17] The primary Congressional objectives in enacting section 4 of the Portal Act, as disclosed by the statutory language and legislative history were:

(1) To minimize uncertainty as to the liabilities of employers which it was felt might arise in the future if the compensability under the Fair Labor Standards Act of such preliminary or postliminary activities should continue to be tested solely by existing criteria[18] for determining compensable worktime, independently of contract, custom, or practice; [19] and

(2) To leave in effect, with respect to the workday proper, the interpretations by the courts and the Administrator of the requirements of the Fair Labor Standards Act with regard to the compensability of activities and time to be included in computing hours worked.[20]

(b) Under section 4 of the Portal Act, an employer who fails to pay an employee minimum wages or overtime compensation for or on account of activities engaged in by such employee is relieved from liability or punishment therefor if, and only if, such activities meet the following three tests:

(1) They constitute ``walking, riding, or traveling'' of the kind described in the statute, or other activities ``preliminary'' or ``postliminary'' to the ``principal activity or activities'' which the employee is employed to perform; and

(2) They take place before or after the performance of all the employee's ``principal activities'' in the workday; and

(3) They are not compensable, during the portion of the day when they are engaged in, by virtue of any contract, custom, or practice of the kind described in the statute.

(c) It will be observed that section 4 of the Portal Act relieves an employer of liability or punishment only with respect to activities of the kind described, which have not been made compensable by a contract or by a custom or practice (not inconsistent with a contract) at the place of employment, in effect at the time the activities are performed. The statute states that ``the employer shall not be so relieved'' if such activities are so compensable; [21] it does not matter in such a situation that they are so-called ``portal-to-portal'' activities.[22]

Accordingly, an employer who fails to take such activities into account in paying compensation to an employee who is subject to the Fair Labor Standards Act is not protected from liability or punishment in either of the following situations.

(1) Where, at the time such activities are performed there is a contract, whether written or not, in effect between the employer and the employee (or the employee's agent or collective-bargaining representative), and by an express provision of this contract the activities are to be paid for; [23] or

(2) Where, at the time such activities are performed, there is in effect at the place of employment a custom or practice to pay for such activities, and this custom or practice is not inconsistent with any applicable contract between such parties.[24]

In applying these principles, it should be kept in mind that under the provisions of section 4(c) of the Portal-to-Portal Act, ``preliminary'' or ``postliminary'' activities which take place outside the workday ``before the morning whistle'' or ``after the evening whistle'' are, for purposes of the statute, not to be considered compensable by a contract, custom or practice if such contract, custom or practice makes them compensable only during some other portion of the day.[25]

---

[16] The Fair Labor Standards Act, as amended, requires the payment of the applicable minimum wage for all hours worked and overtime compensation for all hours in excess of 40 in a workweek at a rate not less than one and one-half times the employees regular rate of pay, unless a specific exemption applies.

[17] The failure of an employer to compensate employees subject to the Fair Labor Standards Act in accordance with its minimum wage and overtime requirements makes him liable to them for the amount of their unpaid minimum wages and unpaid overtime compensation together with an additional equal amount (subject to section 11 of the Portal-to-

Portal Act, discussed below in Sec. 790.22) as liquidated damages (section 16(b) of the Act); and, if his Act or omission is willful, subjects him to criminal penalties (section 16(a) of the Act). Civil actions for injunction can be brought by the Administrator (sections 11(a) and 17 of the Act).

[18] Employees subject to the minimum and overtime wage provisions of the Fair Labor Standards Act have been held to be entitled to compensation in accordance with the statutory standards, regardless of contrary custom or contract, for all time spent during the workweek in ``physical or mental exertion (whether burdensome or not), controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business" (Tennessee Coal Iron & R.R. Co. v. Muscoda Local, 321 U.S. 590, 598), as well as for all time spent in active or inactive duties which such employees are engaged to perform (Armour & Co. v. Wantock, 323 U.S. 126, 132-134; Skidmore v. Swift & Co., 323, U.S. 134, 136-137).

[19] Portal Act, section 1: Senate Report, pp. 41, 42, 46-49; Conference Report, pp. 12, 13; statements of Senator Wiley, 93 Cong. Rec. 2084, 4269-4270; statements of Senator Donnell, 93 Cong. Rec. 2089, 2121, 2122, 2181, 2182, 2362, 2363; statements of Senator Cooper, 93 Cong. Rec. 2292-2300.

[20] Senate Report, pp. 46-49; Conference Report, pp. 12, 13; statements of Senator Donnell, 93 Cong. Rec. 2181, 2182, 2362; statements of Senator Cooper, 93 Cong. Rec. 2294, 2296, 2297, 2299, 2300; statement of Representative Gwynne, 93 Cong. Rec. 4388; statements of Senator Wiley, 93 Cong. Rec. 2084, 4269-4270.

[21] Section 4(b) of the Act (quoted in Sec. 790.3).

[22] Conference Report, pp. 12, 13; colloquy between Senators Donnell and Hakes, 93 Cong. Rec. 2181-2182; colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298, cf. colloquy between Senators Donnell and Hawkes, 93 Cong. Rec. 2179.

[23] Statements of Senator Donnell, 93 Cong. Rec. 2179, 2181, 2182; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298, 2299.

[24] Statements of Senator Donnell, 93 Cong. Rec. 2181, 2182.

[25] Conference Report, pp. 12, 13. See also Sec. 790.12.

29 CFR § 790.6 Periods within the ``workday" unaffected.

(a) Section 4 of the Portal Act does not affect the computation of hours worked within the ``workday" proper, roughly described as the period ``from whistle to whistle," and its provisions have nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by an employee during that period.[34] Under the provisions of section 4, one of the conditions that must be present before ``preliminary" or ``postliminary" activities are excluded from hours worked is that they `occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases' the principal activity or activities which he is employed to perform. Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of that section have no application. Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted.[35] The principles for determining hours worked within the ``workday" proper will continue to be those established under the Fair Labor Standards Act without reference to the Portal Act,[36] which is concerned with this question only as it relates to time spent outside the ``workday" in activities of the kind described in section 4.[37]

(b) ``Workday'' as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period. For example, a rest period or a lunch period is part of the ``workday'', and section 4 of the Portal Act therefore plays no part in determining whether such a period, under the particular circumstances presented, is or is not compensable, or whether it should be included in the computation of hours worked.[38] If an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his ``workday'' commences at the time he reports there for work in accordance with the employer's requirement, even though through a cause beyond the employee's control, he is not able to commence performance of his productive activities until a later time. In such a situation the time spent waiting for work would be part of the workday,[39] and section 4 of the Portal Act would not affect its inclusion in hours worked for purposes of the Fair Labor Standards Act.

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[34] The report of the Senate Judiciary Committee states (p. 47), ``Activities of an employee which take place during the workday are * * * not affected by this section (section 4 of the Portal-to-Portal Act, as finally enacted) and such activities will continue to be compensable or not without regard to the provisions of this section.''

[35] See Senate Report, pp. 47, 48; Conference Report, p. 12; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269 (also 2084, 2085); statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388; statements of Senator Cooper, 93 Cong. Rec. 2293-2294, 2296-2300; statements of Senator Donnell, 93 Cong. Rec. 2181, 2182, 2362.

[36] The determinations of hours worked under the Fair Labor Standards Act, as amended is discussed in part 785 of this chapter.

[37] See statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 3269. See also the discussion in Secs. 790.7 and 790.8.

[38] Senate Report, pp. 47, 48. Cf. statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Senator Donnell, 93 Cong. Rec. 2362; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298.

[39] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297, 2298.

29 CFR §790.7 ``Preliminary'' and ``postliminary'' activities.

(a) Since section 4 of the Portal Act applies only to situations where employees engage in ``preliminary'' or ``postliminary'' activities outside the workday proper, it is necessary to consider what activities fall within this description. The fact that an employee devotes some of his time to an activity of this type is, however, not a sufficient reason for disregarding the time devoted to such activity in computing hours worked. If such time would otherwise be counted as time worked under the Fair Labor Standards Act, section 4 may not change the situation. Whether such time must be counted or may be disregarded, and whether the relief from liability or punishment afforded by section 4 of the Portal Act is available to the employer in such a situation will depend on the compensability of the activity under contract, custom, or practice within the meaning of that section.[40] On the other hand, the criteria described in the Portal Act have no bearing on the compensability or the status as worktime under the Fair Labor Standards Act of activities that are not ``preliminary'' or ``postliminary'' activities outside the workday.[41] And even where there is a contract, custom, or practice to pay for time spent in such a ``preliminary'' or ``postliminary'' activity, section 4(d) of the Portal Act does not make such time hours worked under the Fair Labor Standards Act, if it would not be so counted under the latter Act alone.[42]

(b) The words ``preliminary activity'' mean an activity engaged in by an employee before the commencement of his ``principal'' activity or activities, and the words ``postliminary activity'' means an activity engaged in by an employee after the completion of his ``principal'' activity or activities. No categorical list of ``preliminary'' and ``postliminary'' activities except those named in the Act can be made, since activities which under one set of

circumstances may be ``preliminary'' or ``postliminary'' activities, may under other conditions be ``principal'' activities. The following ``preliminary'' or ``postliminary'' activities are expressly mentioned in the Act: ``Walking, riding, or traveling to or from the actual place of performance of the principal activity or activities which (the) employee is employed to perform.'' [43]

(c) The statutory language and the legislative history indicate that the ``walking, riding or traveling'' to which section 4(a) refers is that which occurs, whether on or off the employer's premises, in the course of an employee's ordinary daily trips between his home or lodging and the actual place where he does what he is employed to do. It does not, however, include travel from the place of performance of one principal activity to the place of performance of another, nor does it include travel during the employee's regular working hours.[44] For example, travel by a repairman from one place where he performs repair work to another such place, or travel by a messenger delivering messages, is not the kind of ``walking, riding or traveling'' described in section 4(a). Also, where an employee travels outside his regular working hours at the direction and on the business of his employer, the travel would not ordinarily be ``walking, riding, or traveling'' of the type referred to in section 4(a). One example would be a traveling employee whose duties require him to travel from town to town outside his regular working hours; another would be an employee who has gone home after completing his day's work but is subsequently called out at night to travel a substantial distance and perform an emergency job for one of his employer's customers.[45] In situations such as these, where an employee's travel is not of the kind to which section 4(a) of the Portal Act refers, the question whether the travel time is to be counted as worktime under the Fair Labor Standards Act will continue

to be determined by principles established under this Act, without reference to the Portal Act.[46]

(d) An employee who walks, rides or otherwise travels while performing active duties is not engaged in the activities described in section 4(a). An illustration of such travel would be the carrying by a logger of a portable power saw or other heavy equipment (as distinguished from ordinary hand tools) on his trip into the woods to the cutting area. In such a situation, the walking, riding, or traveling is not segreable from the simultaneous performance of his assigned work (the carrying of the equipment, etc.) and it does not constitute travel ``to and from the actual place of performance" of the principal activities he is employed to perform.[47]

(e) The report of the Senate Committee on the Judiciary (p. 47) describes the travel affected by the statute as ``Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities within the employer's plant, mine, building, or other place of employment, irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or before or after the employee has checked in or out." The phrase, actual place of performance," as used in section 4(a), thus emphasizes that the ordinary travel at the beginning and end of the workday to which this section relates includes the employee's travel on the employer's premises until he reaches his workbench or other place where he commences the performance of the principal activity or activities, and the return travel from that place at the end of the workday. However where an employee performs his principal activity at various places (common examples would be a telephone lineman, a ``trouble-shooter" in a manufacturing plant, a meter reader, or an exterminator) the travel between those places is not travel of the nature described in this section, and the Portal Act

has not significance in determining whether the travel time should be counted as time worked.

(f) Examples of walking, riding, or traveling which may be performed outside the workday and would normally be considered ``preliminary" or ``postliminary" activities are (1) walking or riding by an employee between the plant gate and the employee's lathe, workbench or other actual place of performance of his principal activity or activities; (2) riding on buses between a town and an outlying mine or factory where the employee is employed; and (3) riding on buses or trains from a logging camp to a particular site at which the logging operations are actually being conducted.[48]

(g) Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered ``preliminary" or ``postliminary" activities, include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks.[49]

(h) As indicated above, an activity which is a ``preliminary" or ``postliminary" activity under one set of circumstances may be a principal activity under other conditions.[50] This may be illustrated by the following example: Waiting before the time established for the commencement of work would be regarded as a preliminary activity when the employee voluntarily arrives at his place of employment earlier than he is either required or expected to arrive. Where, however, an employee is required by his employer to report at a particular hour at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has

elapsed, waiting for work would be an integral part of the employee's principal activities.[51] The difference in the two situations is that in the second the employee was engaged to wait while in the first the employee waited to be engaged.[52]

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[40] See Conference Report. pp. 10, 12, 13; statements of Senator Donnell, 93 Cong. Rec. 2178-2179, 2181, 2182; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298. See also Secs. 790.4 and 790.5.

[41] See Conference Report, p. 12; Senate Report, pp. 47, 48; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388. See also Sec. 790.6.

[42] See Sec. 790.5(a).

[43] Portal Act, subsections 4(a), 4(d). See also Conference Report, p. 13; statement of Senator Donnell, 93 Cong. Rec. 2181, 2362.

[44] These conclusions are supported by the limitation, ``to and from the actual place of performance of the principal activity or activities which (the) employee is employed to perform," which follows the term ``walking, riding or traveling" in section 4(a), and by the additional limitation applicable to all ``preliminary" and ``postliminary" activities to the effect that the Act may affect them only if they occur ``prior to" or ``subsequent to" the workday. See, in this connection the statements of Senator Donnell, 93 Conf. Rec. 2121, 2181, 2182, 2363; statement of Senator Cooper, 93 Cong. Rec. 2297. See also Senate Report, pp. 47, 48.

[45] The report of the Senate Judiciary Committee (p. 48) emphasized that this section of the Act ``does not attempt to cover by specific language that many thousands of situations that do not readily fall within the pattern of the ordinary workday."

[46] These principles are discussed in part 785 of this chapter.

[47] Senator Cooper, after explaining that the ``principal" activities referred to include activities which are an integral part of a ``principal" activity (Senate Report, pp. 47, 48), that is, those which ``are

indispensable to the performance of the productive work," summarized this provision as it appeared in the Senate Bill by stating: ``We have clearly eliminated from compensation walking, traveling, riding, and other activities which are not an integral part of the employment for which the worker is employer." 93 Cong. Rec. 2299.

[48] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2121, 2182, 3263.

[49] See Senate Report p. 47. Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's ``principal activity". See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298. See also paragraph (h) of this section and Sec. 790.8(c). This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

[50] See paragraph (b) of this section. See also footnote 49.

[51] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2298.

[52] See Skidmore v. Swift & Co., 323 U.S. 134, 7 WHR 1165.

29 CFR §790.8 ``Principal'' activities.

(a) An employer's liabilities and obligations under the Fair Labor Standards Act with respect to the ``principal'' activities his employees are employed to perform are not changed in any way by section 4 of the Portal Act, and time devoted to such activities must be taken into account in computing hours worked to the same extent as it would if the Portal Act had not been enacted.[53] But before it can be determined whether an activity is ``preliminary or postliminary to (the) principal activity or activities'' which the employee is employed to perform, it is generally necessary to determine what are such ``principal'' activities.[54]

The use by Congress of the plural form ``activities'' in the statute makes it clear that in order for an activity to be a ``principal'' activity, it need not be predominant in some way over all other activities engaged in by the employee in performing his job; [55] rather, an employee may, for purposes of the Portal-to-Portal Act be engaged in several ``principal'' activities during the workday. The ``principal'' activities referred to in the statute are activities which the employee is ``employed to perform''; [56] they do not include noncompensable ``walking, riding, or traveling'' of the type referred to in section 4 of the Act.[57] Several guides to determine what constitute ``principal activities'' was suggested in the legislative debates. One of the members of the conference committee stated to the House of Representatives that ``the realities of industrial life,'' rather than arbitrary standards, ``are intended to be applied in defining the term `principal activity or activities','' and that these words should ``be interpreted with due regard to generally established compensation practices in the particular industry and trade.''[58] The legislative history further indicates that Congress intended the words ``principal activities'' to be construed liberally in the light

of the foregoing principles to include any work of consequence performed for an employer, no matter when the work is performed.[59] A majority member of the committee which introduced this language into the bill explained to the Senate that it was considered ``sufficiently broad to embrace within its terms such activities as are indispensable to the performance of productive work.'' [60]

(b) The term ``principal activities'' includes all activities which are an integral part of a principal activity.[61] Two examples of what is meant by an integral part of a principal activity are found in the Report of the Judiciary Committee of the Senate on the Portal-to-Portal Bill.[62] They are the following:

(1) In connection with the operation of a lathe an employee will frequently at the commencement of his workday oil, grease or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the work-benches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee. Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.[63]

(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance.[64] If an employee in a

chemical plant, for example, cannot perform his principal activities without putting on certain clothes,[65] changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity.[66] On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a ``preliminary" or ``postliminary" activity rather than a principal part of the activity.[67] However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.[67]

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[53] See Secs. 790.4 through 790.6 of this bulletin and part 785 of this chapter, which discusses the principles for determining hours worked under the Fair Labor Standards Act, as amended.

[54] Although certain ``preliminary" and ``postliminary" activities are expressly mentioned in the statute (see Sec. 790.7(b)), they are described with reference to the place where principal activities are performed. Even as to these activities, therefore, identification of certain other activities as ``principal" activities
is necessary.

[55] Cf. Edward F. Allison Co., Inc. v. Commissioner of Internal Revenue, 63 F. (2d) 553 (C.C.A. 8, 1933).

[56] Cf. Armour & Co. v. Wantock, 323 U.S. 126, 132-134; Skidmore v. Swift & Co., 323 U.S. 134, 136-137.

[57] See statement of Senator Cooper, 93 Cong. Rec. 2297.

[58] Remarks of Representative Walter, 93 Cong. Rec. 4389. See also statements of Senator Cooper, 93 Cong. Rec. 2297, 2299.

[59] See statements of Senator Cooper, 93 Cong. Rec. 2296-2300. See also Senate Report, p. 48, and the President's message to Congress on approval of the Portal Act, May 14, 1947 (93 Cong. Rec. 5281).

[60] See statement of Senator Cooper, 93 Cong. Rec. 2299.

[61] Senate Report, p. 48; statements of Senator Cooper, 93 Cong. Rec. 2297-2299.

[62] As stated in the Conference Report (p. 12), by Representative Gwynne in the House of Representatives (93 Cong. Rec. 4388) and by Senator Wiley in the Senate (93 Cong. Rec. 4371), the language of the provision here involved follows that of the Senate bill.

[63] Statement of Senator Cooper, 93 Cong. Rec. 2297; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350. The fact that a period of 30 minutes was mentioned in the second example given by the committee does not mean that a different rule would apply where such preparatory activities take less time to perform. In a colloquy between Senators McGrath and Cooper, 93 Cong. Rec. 2298, Senator Cooper stated that ``There was no definite purpose in using the words `30 minutes' instead of 15 or 10 minutes or 5 minutes or any other number of minutes." In reply to questions, he indicated that any amount of time spent in preparatory activities of the types referred to in the examples would be regarded as a part of the employee's principal activity and within the compensable workday. Cf. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 693.

[64] See statements of Senator Cooper, 93 Cong. Rec. 2297-2299, 2377; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350.

[65] Such a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work. See footnote 49.

[66] See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298.

[67] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2305-2306, 2362; statements of Senator Cooper, 93 Cong. Rec. 2296-2297, 2298.